

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 00-245
Table of Allotments,)	RM-9971
FM Broadcast Stations.)	RM-10185
(Alberta, Virginia and Whitakers, North)	RM-10186
Carolina; Dinwiddie, Virginia and Garysburg,)	
North Carolina) ¹)	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: May 8, 2002

Released: May 17, 2002

By the Assistant Chief, Audio Division:

Background

1. The Audio Division has before it the Notice of Proposed Rule Making, 15 FCC Rcd 24136 (2000) (“Notice”), issued in response to a petition for rule making filed on behalf of MainQuad Broadcasting, Inc. (MainQuad), licensee of Station WSMY-FM, Channel 276A, at Alberta, Virginia.² MainQuad requests the substitution of Channel 276C3 for Channel 276A at Alberta, Virginia, the reallocation of Channel 276C3 from Alberta to Whitakers, North Carolina, as that community’s first local aural transmission service, and the modification of its authorization to specify Whitakers as its community of license. MainQuad also proposes the allotment of Channel 299A to Alberta as a replacement for Channel 276A and has agreed to apply for Channel 299A if the Commission were to allot that channel to Alberta (RM-9971).

2. Garysburg Radio has filed “Comments and Counterproposal” in which it proposes that Channel 299A be substituted for Channel 276A at Alberta and that Channel 276A be allotted to Garysburg, Maryland as Garysburg’s first local transmission service (RM-10185). Dinwiddie Radio Company (“Dinwiddie Radio”) filed “Comments and Counterproposal” in which it proposes that Channel 299A be allotted to Dinwiddie, Virginia, as Dinwiddie’s first local transmission service, and that Channel 276A be retained at Alberta (RM-10186). MainQuad and Garysburg Radio filed Reply Comments to the foregoing Comments. The

¹ The communities of Dinwiddie, Virginia and Garysburg, North Carolina, were added to the caption.

² The original petition for rule making was filed by Broomfield Broadcasting, Inc. (“Broomfield”), the former permittee of Station WAQD(FM). The call sign for that station has been changed to WSMY-FM. Prior to the issuance of the Notice herein, the Commission granted the assignment of Broomfield’s construction permit to MainQuad, who has succeeded to Broomfield’s interest in this rule making proceeding. The station facilities have subsequently been licensed.

Commission issued a Public Notice on July 19, 2001 (Report No. 2496), soliciting comments on the counterproposals. In response to that Public Notice, The Mayors of Alberta and Garysburg, Garysburg Radio, Dinwiddie Radio, and MainQuad filed reply comments. In addition, Garysburg Radio filed a "Request for Leave to File Supplement and Supplement to Reply Comments," to which MainQuad filed an Opposition. Garysburg Radio filed a Reply to the foregoing Opposition.³ An Order to Show Cause, DA 01-2986, released December 21, 2001, was issued to MainQuad to demonstrate why its license should not be modified to specify operation on Channel 299A in lieu of Channel 276A at Alberta, Virginia. MainQuad filed a Response to the foregoing Order to Show Cause, to which Garysburg Radio filed a Reply. MainQuad filed Comments with respect to the foregoing Reply, Garysburg Radio filed a Response to MainQuad's Comments and MainQuad filed Further Comments in response to Garysburg Radio's most recent Reply.⁴ For the reasons stated below, we grant Garysburg Radio's counterproposal to substitute Channel 299A for Channel 276A at Alberta and to allot Channel 276A to Garysburg.

Community Proposals

3. MainQuad filed its request to reallocate Channel 276C3 to Whitakers, North Carolina, pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.⁵ MainQuad's reallocation proposal is mutually exclusive with the allotment it is presently using, as required by Section 1.420(i) of the Rules. In considering a reallocation proposal, we compare the existing allotment versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982).⁶

³ In order to assure a more complete record, Garysburg Radio's Request for Leave to File Supplement is granted. We have considered the Supplement, the Opposition to the Supplement, and the Reply to the Opposition. Garysburg Radio's Supplement contains an argument that is based upon an inaccurate assumption. The Supplement agrees with a statement in Dinwiddie Radio's Reply Comments that there is no 60 dBu contour overlap between the service areas of Station WSMY-FM and the Whitakers facility proposed by MainQuad. Based upon our own engineering review, this statement is incorrect. Consequently, we reject Garysburg Radio's argument that MainQuad's proposed change in community of license proposal should be considered as a new allotment for Whitakers, North Carolina, subject to an auction between competing applications, rather than a change in community of license proposal.

⁴ MainQuad filed a Motion for Leave to File its Comments, Garysburg Radio filed a Motion to Accept its Response, and MainQuad filed a Motion to Accept its Further Comments. In order to assure a complete record in this proceeding, we grant these motions.

⁵ See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

⁶ The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters [co-equal weight is given to priorities (2) and (3)].

4. MainQuad's petition for rulemaking observes that Whitakers, North Carolina (2000 U.S. Census population of 799) is an incorporated community that has a mayor and its own five-member town council, police service, volunteer fire department, post office, and several local businesses that have the name "Whitakers" in their titles. MainQuad notes that Alberta (2000 U.S. Census population of 306) is a smaller community than Whitakers. Thus, MainQuad concludes that Whitakers is to be preferred under the Commission's allotment priorities because it would provide the larger community of Whitakers with its first local aural transmission service (priority 3 of the FM Priorities). In order to insure that Alberta does not lose its only aural transmission service, MainQuad has requested that the Commission allot Channel 299A to Alberta as a replacement for Channel 276A and commits to apply for and construct the Channel 299A facilities if the Commission allot Channel 299A to Alberta. MainQuad also argues that its proposal to allot Channel 276C3 to Whitakers should be preferred under priority 4 of the FM Priorities since it would serve 172,026 persons compared to its current Alberta station that provides service to 21,543 persons.

5. In its "Comments and Counterproposal", Garysburg Radio proposes that Channel 299A be substituted for Channel 276A at Alberta and that Channel 276A be allotted to Garysburg, North Carolina, as the first local aural transmission service for Garysburg. Garysburg Radio observes that Garysburg (2000 U.S. Census population of 1,254) is an incorporated community that has its own governmental services, including a mayor and commissioners, a city hall and police department. In addition, Garysburg Radio notes that Garysburg is home to four churches and a number of commercial businesses. Dinwiddie Radio also submitted "Comments and Counterproposal" in which it proposes that Channel 299A be allotted to Dinwiddie, Virginia and that Channel 276A be retained at Alberta, Virginia. Dinwiddie is an unincorporated community that serves as the county seat of Dinwiddie County. The 2000 Rand-McNally Commercial Atlas and Marketing Guide lists the population of Dinwiddie at 200 people. Dinwiddie Radio asserts that Dinwiddie is home to the Dinwiddie County Courthouse, the Sheriff's Department and the Departments of Economic Development, Health, Planning, Social Services and Transportation. Dinwiddie Radio also states that Dinwiddie has its own post office and zip code and commercial businesses, including retail establishments, banks, restaurants, medical offices and law offices. Although Dinwiddie Radio claims that Dinwiddie does not have ascertainable boundaries because it is not incorporated, it points out that ascertainable boundaries are not a prerequisite to a finding of community status for purposes of Section 307(b) of the Communications Act of 1934, as amended ("the Act").⁷ In this regard, we find that Whitakers, North Carolina; Garysburg, North Carolina; and Dinwiddie, Virginia, qualify as "communities" for purposes of Section 307(b) of the Act.

6. Dinwiddie Radio and Garysburg Radio allege that MainQuad's proposal to provide service to Whitakers, North Carolina, is really an attempt to provide service to the

⁷ See Beacon Broadcasting, 2 FCC Rcd 3469, 3470 (1987).

Rocky Mount Urbanized Area. In its “Comments and Counterproposal,” Dinwiddie Radio argues that if MainQuad chose the “closest fully-spaced site” to Whitakers rather than the site it chose to serve that city, it would place a 70 dBu contour over 63.9 percent of the Rocky Mount Urbanized Area. We find Dinwiddie Radio’s allegations to be speculative. In a change of community case, the licensee is not required to choose a site that is as close as possible to the proposed city of license. Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995) (“Headland”) states that if a rulemaking proponent seeking a first local service preference intends to move its authorized facility to a community that is adjacent to an urbanized area and if its intended operation would place a city grade (70 dBu) signal over 50 percent or more of the urbanized area, the proponent must demonstrate that the intended city of license is sufficiently independent of the central city to justify a first local service preference, pursuant to the standards set forth in Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). Our engineering staff has determined that MainQuad’s proposed transmitter site would provide 70 dBu coverage to only about 14 percent of the Rocky Mount Urbanized Area. In this light, MainQuad is not required to make a showing of Whitakers’ independence from Rocky Mount pursuant to the policy enunciated in Headland.

Interference to TV Channel 12

7. MainQuad reported in its initial Comments that it started its program tests pursuant to its construction permit for Channel 276A, Station WSMY-FM, just prior to December 21, 2000, but had to go off the air because of numerous interference complaints received by the Mayor of Alberta. In its Reply Comments of August 3, 2001, MainQuad explains that the complaints received concerned interference by Station WSMY-FM to the reception of television Station WWBT operating on Channel 12, Richmond, Virginia. MainQuad observes that Station WWBT operates on the second harmonic of Station WSMY-FM’s Channel 276A and that after testing Station WSMY-FM’s transmission facilities and finding that they were operating in compliance with the Commission’s Rules, MainQuad recommenced operation of the station on July 23, 2001. At that time, MainQuad claims, complaints started almost immediately and Alberta’s Mayor made it clear that she would prefer that the station go off the air. As a result, MainQuad states, it took the station silent in August 2001. MainQuad asserts that the interference stems from television viewers’ use of antenna boosters to receive television signals.

8. In its “Reply to Response to Order to Show Cause,” Garysburg Radio observes that modifying Station WSMY-FM’s license to operate on Channel 299A would provide an immediate solution to retaining local radio service available at Alberta, Virginia, as opposed to building a new Alberta station on Channel 299, as MainQuad has proposed. Garysburg Radio also notes that modifying Station WSMY-FM’s current operating Channel from 276A to Channel 299A would eliminate potential interference to the signal of Station WWBT operating on TV Channel 12, and that the FM channel change could be done at Station WSMY-FM’s present transmitter site. Garysburg Radio has agreed to reimburse MainQuad’s reasonable expenses in connection with the foregoing channel change if

Garysburg Radio becomes the permittee of the proposed Garysburg station, as required by Circleville, Ohio, 8 FCC Rcd 159 (1967)

9. With respect to the interference to TV viewers caused by MainQuad's Station WSMY-FM in Alberta, MainQuad asserts that it has found an alternative transmitter site from which it is hoped that operation on Channel 276A will cause no interference to TV Station WWBT's Channel 12 signal. Nevertheless, MainQuad asserts, Station WSMY-FM can not operate from that site on Channel 299A (for which MainQuad intends to apply if its change of community of community proposal is granted) because such operation would violate the Commission's spacing requirements under Section 73.207 of the Commission's Rules.

10. We believe that modifying Station WSMY-FM's license to operate on Channel 299A at Alberta, Virginia, would provide two significant public interest benefits. First, it would provide an immediate solution to retaining local radio transmission service at Alberta, Virginia, at MainQuad's present transmitter site, and avoid any delay in building a new Alberta station on Channel 299A, as MainQuad has proposed. Second, it would apparently lessen, if not eliminate, potential interference to the signal of television Station WWBT, Channel 12, so that area residents could receive both Channel 12's signal and Station WSMY-FM's signal. We also note that the reference coordinates for the Channel 299A allotment at Alberta comply with the separation requirements set forth in Section 73.207 of the Rules.

MainQuad's Response to Order To Show Cause

11. The Order To Show Cause, DA 01-2986, released December 12, 2001, asked MainQuad why its Station WSMY-FM license should not be modified to specify operation on Channel 299A in lieu of Channel 276A at Alberta, in order to accommodate the allotment of Channel 276A to Garysburg, North Carolina, and the provision of a first local aural transmission service to Garysburg, while retaining the only local aural transmission for Alberta. MainQuad's "Response to Order To Show Cause" states that modification of Station WSMY-FM's license to specify operation on Channel 299A and accommodate the allotment of Channel 276A to Garysburg, North Carolina, would preclude the initiation of new service to Whitakers, North Carolina. Further, MainQuad argues that Channel 276C3 should be allotted to Whitakers because the difference between the populations of Garysburg and Whitakers is de minimis, and because 114,000 more people⁸ would receive additional service from MainQuad's reallocation proposal than from Garysburg Radio's counterproposal, citing Seabrook et al., Texas, 10 FCC Rcd 9360 (1995). Mainquad also observes that MainQuad Communications, Inc., the licensee of Station WPTM(FM), Channel 272A, in Roanoke Rapids, North Carolina, and an affiliate of MainQuad, has filed a petition

⁸ In its "Further Comments" filed April 5, 2002, MainQuad asserts that an engineering study using 2000 U.S. Census data reveals that the proposed Garysburg facility would provide additional service to 61,131 persons whereas the proposed Whitakers facility would provide additional service to 188,344 persons.

for rulemaking in which it proposes to change its community of license from Roanoke Rapids to Garysburg, North Carolina, thus providing first local service to Garysburg. MainQuad claims that since the latter change of community proposal could be accomplished without a change in channel, the proposal, if granted, would only require an FCC Form 302-FM to modify Station WPTM's license to provide first local service to Garysburg and thus would provide first local service to Garysburg in a more speedy fashion than Garysburg Radio's counterproposal. MainQuad asserts that if Garysburg Radio's proposal to allot Channel 276A to Garysburg were granted, Garysburg would not get service from the proposed Channel 276A facility until the Commission opens a window for the submission of applications, holds an auction if more than one application is filed, and a facility is constructed. In this light, Mainquad submits that obtaining local service to Garysburg pursuant to Garysburg Radio's proposal could take several years. Lastly, MainQuad states that if the Commission requires absolute certainty that the WPTM community of license will be changed to Garysburg, it should defer action on the Order To show Cause until after the completion of the WPTM rulemaking proceeding.

12. With regard to MainQuad's "Response to Order to Show Cause," we will not withhold action in this proceeding on the basis of a possible outcome of a subsequent proceeding. Such a consideration is too speculative to allow for orderly and expeditious resolution of rulemaking proceedings. Once we allot a channel to a community on the FM Table of Allotments as a first local service, any subsequent allotment of a channel to the same community will be termed a "second local service," without regard to which channel is "first" to be activated.

Conclusion

13. Each of the three proposals in this proceeding will provide first local aural transmission service, which is priority 3 of the FM Priorities, *supra*, at note 6. MainQuad's proposal will provide first local service to Whitakers, North Carolina, while retaining local service to Alberta. Garysburg Radio's counterproposal will provide first local service to Garysburg, North Carolina, while retaining local service to Alberta. Dinwiddie Radio's proposal will provide a first local service to Dinwiddie, Virginia, while retaining local service at Alberta, Virginia. Since there are insufficient channels available to allow the grant of all the proposals, we must determine which of the three proposals in this proceeding would result in a preferential arrangement of allotments.⁹ To do so, we must compare the proposals using the allotment priorities set forth in FM Priorities. Further, since Garysburg (2000 U.S. Census population of 1,254) has a greater population than Whitakers, North Carolina (2000 U.S. Census population of 799), and Dinwiddie, Virginia, (2000 Rand-McNally population of 200), providing a first local aural transmission service to Garysburg has priority over providing such service to Whitakers or

⁹ Our engineering staff attempted to find a combination of channel allotments that would allow the grant of all three proposals or the grant of MainQuad's proposal and Garysburg Radio's proposal. No such combination could be found.

Dinwiddie. See Blanchard, Louisiana and Stephens, Arkansas, 10 FCC Rcd 9828, 9829 (1995) and Rose Hill et al., North Carolina, 11 FCC Rcd 21223, 21231 (Allocations Br., 1996), affirmed, 15 FCC Rcd 10739 (2000), application for review denied, 16 FCC Rcd 15610 (2001).¹⁰ In this regard, we observe that Garysburg, Whitakers, and Dinwiddie receive more than five aural services and are considered to be well-served. Based on the foregoing, we believe that the public interest would be best served by reallocating Channel 276A from Alberta, Virginia to Garysburg, North Carolina. To accommodate this reallocation of Channel 276A while retaining local service to Alberta, we will modify the license of Station WSMY-FM to specify operation on Channel 299A at Alberta, Virginia.

14. Channel 276A can be allotted to Garysburg, North Carolina, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, utilizing Garysburg Radio's requested site at the coordinates of 36-26-30 North Latitude and 77-35-00 West Longitude. This site involves a restriction of 2.4 kilometers (1.5 miles) southwest of Garysburg.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective July 8, 2002, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Alberta, Virginia	299A
Garysburg, North Carolina	276A

16. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of MainQuad Broadcasting, Inc. for Station WSMY-FM, Alberta, Virginia, IS MODIFIED to specify operation on Channel 299A subject to the

¹⁰ MainQuad's reliance on Seabrook et al., Texas ("Seabrook"), 10 FCC Rcd 9360 (1995), is misplaced. In Seabrook, the Commission determined that the population differences between the gain areas contained in two upgrade proposals (144,000 persons) was the determining factor in choosing between two competing channel upgrades under priority 4 of FM Priorities, even though the losing competitor would provide a second aural service to 455 persons. Although the provision of second full-time aural service under priority 2 of the FM Priorities is generally considered to be equal to the provision of a first local service, the Commission ruled that, the provision of a second aural service to 455 persons was found to be de minimis, when considered in conjunction with the fact that the Seabrook upgrade would provide service to over 144,000 more persons than the competing Huntsville upgrade under priority 4. In the instant case, there is ample case law justifying a choice between three first local service proposals based upon differences in population of several hundred persons. Seabrook was decided by comparing competing proposals "on the basis of all public interest factors under Priority 4," 10 FCC Rcd at 9362, whereas the instant case is being decided by comparing population differences between competing proposals under priority 3 in the situation where none of the communities "falls below a threshold level of reception services," 10 FCC Rcd at 9829.

following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the current license for Station WSMY-FM except for the channel as specified above. Any changes, except for those specified, require prior authorization pursuant to an application for construction permit (Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Commission's rules, provided the transmission facilities comply in all respects with the current license for Station WSMY-FM except for the channel as specified above, and a license application (Form 302) is filed within 10 days of the commencement of program tests.

17. IT IS FURTHER ORDERED That the petition for rule making (RM-9971) filed on behalf of MainQuad Broadcasting, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED That the counterproposal (RM-10185) filed by Garysburg Radio IS GRANTED and the counterproposal (RM-10186) filed by Dinwiddie Radio Company IS DENIED.

19. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

20. For further information concerning the above, contact R. Barthen Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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